Duff-Norton Company, Inc. *and* Drivers, Chauffeurs, Warehousemen and Helpers Local No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 11-CA-9440

May 7, 1981

DECISION AND ORDER

Upon a charge filed on October 1, 1980, by Drivers, Chauffeurs, Warehousemen and Helpers Local No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Duff-Norton Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 11, issued a complaint and notice of hearing on October 15, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 10, 1980, following a Board election in Case 11-RC-4782, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 25, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 21, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent further alleged in its answer that the Board's certification of the Union was unlawful and demanded a hearing.

On December 19, 1980, counsel for the General Counsel filed directly with the Board a motion to strike portions of Respondent's answer and affirmative defense to complaint and notice of hearing and Motion for Summary Judgment. On January 14, 1981, counsel for the General Counsel filed an amendment to the above motion with an exhibit attached. Subsequently, on January 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent admitted that the Acting Regional Director certified the Union as the exclusive collective-bargaining representative of the unit employees. However, Respondent maintained it is without knowledge or information sufficient to form a belief that a majority of the unit employees designated the Union as their representative, hence it denied that allegation. Respondent admitted that the Union forwarded a letter wherein the Union sought to bargain collectively, and that it has refused and continues to refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of all the employees in the unit. Respondent also admitted that the unit described in the complaint constituted an appropriate unit within the meaning of Section 9(b) of the Act. Respondent denied that the Union was the exclusive majority representative of its employees for the purposes of collective bargaining. Respondent also denied that it violated Section 8(a)(1) and (5) of the Act. As a further defense set forth in its answer and in its response to the General Counsel's motion, Respondent contends that the certification of the Union is invalid and it requests a hearing to present evidence which allegedly is newly discovered and previously unavailable. In support of this contention Respondent asserts that the employees in the excluded job classifications of industrial engineering technician and scheduler did have a community of interest with those included in the unit, and their exclusion from the unit was erroneous. Respondent further contends that the General Counsel's position that Respondent was required to present its evidence in its answer and her request to strike portions of Respondent's answer and affirmative defense are without merit.

Review of the record herein, including the record in Case 11-RC-4782, reveals that on November 2, 1979, the Acting Regional Director for Region 11 issued his Decision and Direction of Election for a unit of all production and maintenance employees at Respondent's Wadesboro, North Carolina, plant, including truckdrivers, floor inspector, shipping and receiving employees, tool

[1] Official notice is taken of the record in the representation proceeding, Case 11-RC-4782, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

crib employees, tool and cutter grinders, and leadmen, but excluding planners, production control clerks, material coordinators, industrial engineering technicians, schedulers, office clericals, salesmen, professional employees, guards, and supervisors as defined in the Act.

On November 28, 1979, the Board denied Respondent's request for review of the Acting Regional Director's decision, but also ruled that the issues raised concerning the unit placement of the material coordinator, industrial engineering technician, and the scheduler could best be resolved through the challenge procedure.[2] On November 29, 1979, a secret-ballot election was held among unit employees. The tally of ballots which issued thereafter showed that, of approximately 185 eligible voters, 88 voted for, and 86 voted against, the Union, and 6 ballots were challenged, a sufficient number to affect the results of the election. On February 7, 1980, the Regional Director for Region 11 issued a Supplemental Decision and Direction in which he sustained the challenges to one ballot, overruled the challenge to another, and directed that a hearing be held to resolve the issues raised by the remaining challenges. On March 24, 1980, a hearing was held. All parties appeared with counsel and participated in the hearing.[3] On May 15, 1980, the Hearing Officer found, *inter alia*, on the basis of his credibility resolutions and analysis of the record, that Harry Williamson and Juanita Williams did not share a community of interest with unit employees and he recommended that the challenges to their ballots be sustained.[4] On May 23, 1980, Respondent filed exceptions to the Hearing Officer's Report and Recommendations on Challenges, wherein it contended, *inter alia*, that these employees met all of the criteria normally followed by the Board in deciding who was to be included in a production and maintenance unit, that the challenges to their ballots should be overruled, and that their ballots be opened and counted. On July, 8, 1980, the Regional Director issued a Second Supplemental Decision and Direction wherein he concluded that the Hearing Officer was correct in his determination that Williamson lacked a sufficient community of interest with unit employees to warrant their inclusion in the unit and that the challenges to their ballots should be sustained.[5] On July 30, 1980, Respondent filed with the Board a request for review of this decision contending, *inter alia*, that Williams and Williamson met all the criteria normally followed by the Board in deciding who was to be included in the bargaining unit.

On August 20, 1980, the Board denied Respondent's request for review of the Regional Director's Second Supplemental Decision and Direction as it raised no substantial issues warranting review. On August 25, 1980, the Regional Director issued a revised tally of ballots which showed 89 ballots for, and 88 ballots against, the Union. On September 10, 1980, the Regional Director issued a corrected certification of representative certifying the Union as the exclusive representative of all the employees in the appropriate unit for the purpose of collective bargaining. By letter dated September 11, 1980, the Union requested information from Respondent concerning job classifications, wages, and fringe benefits and available dates for negotiations and the identity of the person who would be negotiating for Respondent. By letter dated September 25, 1980, Respondent denied the Union's request.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6] In its response to the General Counsel's motion, Respondent alleged that in the underlying representation proceeding "there was a shift of fundamental significance" in reasoning by subordinate officials of the Board and that the mass of uncontroverted evidence, which showed that Williams and Williamson enojoyed a community of interest with unit employees, was ignored. It requests a hearing at which it will tender newly discovered and previously unavailable evidence, but it does not describe or otherwise show how the evidence is newly discovered or was previously unavailable. Respondent admits that the alleged "shift" in reasoning was discussed in detail in its request for review of the Regional Director's Second Supplemental Decision, which decision was affirmed by the Board. Furthermore, a review of the record herein, including the Hearing Officer's report, Respondent's exceptions thereto, the Regional Director's Second Supplemental Decision and Direction, and Respond-

[2] The Acting Regional Director excluded these three job classifications from the unit because of a lack of a substantial community of interest between unit employees and the employees in the three jobs.

[3] Following the hearing, Respondent filed a brief in support of its position that the ballots of the four employees in issue should be opened and counted.

[4] No exception was taken to the Hearing Officer's recommendation to open and count Lorri Trexler's ballot.

[5] The Regional Director found, contrary to the Hearing Officer, that challenged employee Ronnie Edwards was a plant clerical employee, that he shared a sufficient community of interest with the unit employees and he directed that Edwards' ballot be opened and counted. No exceptions were filed to this recommendation.

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

ent's request for review clearly show that full consideration was given to the issues raised by the challenges to Williams' and Williamson's ballots. Accordingly, we find that all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and, as discussed *supra*, Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[7]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation with a plant in Wadesboro, North Carolina, where it is engaged in the manufacture of electrical parts. On November 2, 1979, the Acting Regional Director in his Decision and Direction of Election found that Respondent was engaged in commerce within the meaning of the Act and that it would effectuate the purposes of the Act to assert jurisdiction herein. No exceptions were filed to the above finding. Furthermore Respondent, in its answer to the complaint herein, admitted that it shipped finished products directly to points outside the State of North Carolina, valued in excess of $50,000, and that it received goods and raw materials directly from points outside the State of North Carolina, valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Drivers, Chauffeurs, Warehousemen and Helpers Local No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[7] In light of our decision herein we find it unncessary to rule on the General Counsel's motion to strike portions of Respondent's answer and affirmative defense to the complaint.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's Wadesboro, North Carolina, plant including truckdrivers, floor inspectors, shipping and receiving employees, tool crib employees, tool and cutter grinders, material coordinators, and leadmen, but excluding planners, production control clerks, industrial engineering technicians, schedulers, office clericals, salesmen, professional employees, guards and supervisors as defined in the Act.

2. The certification

On November 29, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 11, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on August 29, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 11, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 25, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 25, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Duff-Norton Company, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Duff-Norton Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Drivers, Chauffeurs, Warehousemen and Helpers Local 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Employer's Wadesboro, North Carolina, plant including truckdrivers, floor inspectors, shipping and receiving employees, tool crib employees, tool and cutter grinders, material coordinators, and leadmen, but excluding planners, production control clerks, industrial engineering technicians, schedulers, office clericals, salesmen, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 10, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 25, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Duff-Norton Company, Inc., Wadesboro, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Drivers, Chauffeurs, Warehousemen and Helpers Local No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Employer's Wadesboro, North Carolina, plant including truckdrivers, floor inspectors, shipping and receiving employees, tool crib employees, tool and cutter grinders, material coordinators, and leadmen, but excluding planners, production control clerks, industrial engineering technicians, schedulers, office clericals, salesmen, professional employees, guards and superviors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the ex-

ercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Respondent's Wadesboro, North Carolina, facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Drivers, Chauffeurs, Warehousemen and Helpers Local No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at the Employer's Wadesboro, North Carolina, plant including truckdrivers, floor inspectors, shipping and receiving employees, tool crib employees, tool and cutter grinders, material coordinators, and leadmen, but excluding planners, production control clerks, industrial engineering technicians, schedulers, office clericals, salesmen, professional employees, guards and supervisors as defined in the Act.

DUFF-NORTON COMPANY, INC.